IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 11TH JUNE 2007 / 21ST JYAISHTA 1929

CRL.A.No. 107 of 2007(C)

SC.1953/2006 of ADDL. SESSIONS COURT (ADHOC), TRIVANDRUM
CP.68/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, ATTINGAL

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APPELLANT:

BABURAJAN,
S/O.CHELLAPPAN,
C-NO.1031,
CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.K.SANIL KUMAR(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S.SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

Crl. Appeal No. 107 OF 2007 C

Dated this the 11th day of June, 2007

J U D G M E N T

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant, who was the sole accused in the Sessions Case No.1953/06 on the file of the Additional Sessions Court(Fast Track-I), Thiruvananthapuram, challenges the conviction entered and the sentence passed against him by the court below for an offence punishable under section 55(a) of the Abkari Act.

2. The case of the prosecution is that on 12.2.1998 at about 4.30 p.m. on the Kattaikonam-Chenkottukonam road in front of the Kattaikonam U.P. School in Ayirooppara village the accused was found in possession of two litres of illicit arrack in a black jerry can having a capacity of 5 litres. Since the above possession was in contravention of the prohibition under the Abkari Act, the accused has committed an offence punishable under section 55(a) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in

support of its case. The prosecution altogether examined four witnesses as PWs 1 to 4 and got marked five documents as Exhibits P1 to P5 and one material object as MO1.

4. After the close of the prosecution evidence, the accused was questioned under section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He stated before court that he was falsely implicated in the case.

5. Since the court below did not consider this case to be a fit case for recording an order of acquittal under section 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

6. The learned Additional Sessions Judge, after trial, as per judgment dated 27.9.2006 found the appellant guilty of the offence punishable under section 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh and on default to pay the fine, to suffer rigorous imprisonment for six months more. It is the said judgment which is assailed in this appeal.

7. I heard Advocate Sri. K. Sanil Kumar, the learned counsel, who defended the appellant on State Brief and Advocate Sri. K.S. Sivakumar, the learned Public Prosecutor, who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not.

The point:

9. PW1 is the Excise Preventive Officer, Kazhakuttom, who detected the offence. PW2 is another Excise Preventive Officer, who accompanied PW1. PW3 is an independent witness, who figured as an attester to Ext.P1 contemporaneous mahazar prepared by PW1 from the spot itself. This witness turned hostile to the prosecution by testifying before court that eventhough he saw the accused carrying a can, he does not know whether the contents of the can was illicit arrack or not. PW4 is the Excise Inspector, Kazhakuttom, who conducted the investigation and finally laid the charge before court.

10. After hearing both sides and after bestowing my anxious consideration to the oral and documentary evidence in the case, I am not satisfied that the prosecution has succeeded in

bringing home the guilt of the appellant beyond reasonable doubt.

11. Notwithstanding the disloyalty shown by PW3, the independent witness, in the absence of any specific motive attributed against PW1 and PW2, their evidence can be relied on to hold that at about 4.30 p.m. on 12.2.1998 the accused was found carrying a jerry can with some liquid inside, on a public road. But the prosecution can succeed in securing a conviction against the appellant only if it is proved that the contents of the jerry can contained illicit arrack attracting the prohibition under section 8(1) of the Act. After the detection, search and seizure of the can, the accused was arrested by PW1 and thereafter the jerry can together with the seized documents were taken along with the accused to the excise office from where PW4, the Excise Inspector, prepared Ext.P4 crime and occurrence report and registered the crime. Eventhough the property list prepared in this case by PW1 was not marked as an exhibit, the same is available in the lower court records and it shows that the seized property was produced before court on 13.2.1998 and assigned the number T.852/98. On the reverse of the said property list, there is an endorsement by the Magistrate on 16.2.1998 directing the Excise Inspector to keep the can in the excise office until further orders.

If the can was returned to the Excise Inspector on 16.2.1998, an explanation is due from the prosecution as to how a sample came to be forwarded to the Chemical Examiner on 17.4.1998 without getting the can back. This is because Ext.P5 certificate of chemical analysis refers to a covering letter dated 17.4.1998 of the JFCM-II, Attingal while forwarding a sample containing 200 ml to the Chemical Examiner for analysis. There is no requisition or forwarding note marked in this case requesting the drawing of a sample from the bulk quantity of the alleged illicit arrack produced in the case. It is not known as to how, even without any orders of the Magistrate to take the sample, a sample containing 200 ml was forwarded to the Chemical Examiner along with a covering letter dated 17.4.1998 from the Magistrate. There is no contemporaneous record maintained by the Magistrate to indicate that a sample was in fact drawn from the bulk quantity of illicit arrack allegedly produced before court on 13.2.1998. The Thondi Section Clerk, who is in-charge of the properties produced before the Magistrate, was also not examined. It is true that Ext.P5 certificate of chemical analysis states that the 200 ml of sample forwarded to the laboratory was found to contain 21.92% by volume of Ethyl Alcohol. But, unless it is proved that the said

sample was drawn from the bulk quantity in the can allegedly possessed by the accused, it cannot be concluded that the results arrived at under Ext.P5 certificate of analysis pertain to the contents of the arrack carried by the accused. The conviction recorded and the sentence passed by the court below overlooking the above vital aspects of the matter cannot, therefore, be supported and are accordingly dislodged.

12. The appellant is, therefore, found not guilty of the offence punishable under section 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case against him.

In the result, this Criminal Appeal is allowed. The conviction entered and the sentence passed against the appellant are set aside as above.

(V. RAMKUMAR, JUDGE)

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V. RAMKUMAR, J.

Crl. Appeal No. 107 OF 2007 C

Dated this the 11th day of June, 2007

GIST OF THE J U D G M E N T

The appellant is found not guilty of the offence publishable under Section 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case against him.

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11th June, 2007